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ICSID Annulment Committee Appointments: Too Much Discretion for the Chairman?

by David Collins*

ABSTRACT:

This article critically examines the system by which individuals are appointed to ICSID annulment committees. It observes the largely unilateral and highly discretionary role of the ICSID Chairman in this process, urging greater participation in the selection of annulment committees by the member states of ICSID in order to improve the transparency and legitimacy in this crucial feature of ICSID dispute settlement. A procedure similar to that adopted with respect to the World Trade Organization's Appellate Body may be instructive in this regard.

1. INTRODUCTION

The International Centre for the Settlement of Investment Disputes ('ICSID') is among the most widely used mechanisms for investor-state arbitration in the world, enjoying membership of 158 signatory states as of April 2013 and identified as an available forum for the resolution of disputes in many thousands of bilateral investment treaties adopted by developed and developing states alike. Among the most controversial features of ICSID's procedures is its annulment mechanism. This feature of the dispute settlement process allows parties to challenge an award rendered by an ICSID tribunal on one or more very narrow grounds, essentially capturing procedural errors regarding the manner in which the award was adjudicated by the tribunal. Most of the commentary on ICSID's annulment procedure to

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date has focussed on substantive assessments of the scope of the decisions of the ad hoc annulment committees, their coherence as a body of international investment jurisprudence and most notably, whether committees have adhered to their highly circumscribed role as reviewers of the grounds of potential illegitimacy of the tribunal's decision-making process and not errors of law.¹ While many of these assessments hold merit, this article will offer critical insight into the process by which the ad hoc annulment committees are constituted. This procedure is worthy of additional scrutiny because the manner in which annulment committees are selected is almost completely removed from the choice of the parties and has only indirect input from the member states of ICSID. In a procedure that is largely undemocratic and certainly lacking in transparency, the choice of composition of the committees is placed at the unilateral discretion of the Chairman of ICSID subject to only a few narrow constraints. This represents an unwelcome derogation of member (as well as party) autonomy over the arbitration process, undermining the fairness and indeed the legitimacy of a key aspect of ICSID's dispute settlement procedure. The article will accordingly recommend modifications to the annulment committee appointment procedure, contemplating a greater role for the member states. This adjustment could augment the integrity of ICSID as an effective, member-driven forum for the settlement of investor-state disputes under international law.

2. THE ICSID ANNULMENT PROCEDURE

¹ E.g. David Caron, "Framing the Work of ICSID Annulment Committees" 6:2 World Arbitration and Mediation Review 173 (2012) and Dohyun Kim, "The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System" 86 New York University Law Review 242 (2011) and D Kim, "The Annulment Committee's Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System" 86 New York University Law Review 242 (2011)

The annulment procedure available under ICSID rules has endured much criticism by commentators but as noted above, it is not the purpose of this article to evaluate the legitimacy of these complaints or even to discuss them in detail. Still, a few general observations regarding the perceived weaknesses of the annulment process is apposite because deficiencies in these substantive areas may be in part addressed by resolving the deficiencies in annulment process. One of the principle attacks on the annulment procedure is that it is very limited, allowing for the extinguishing of awards in only a few, very narrow circumstances,² a characteristic that reflects the status of annulment as an exceptional procedure in the ICSID dispute settlement process. Among these narrow grounds as outlined in the ICSID Convention, the most common instigations of the annulment mechanism are when a party alleges that the tribunal manifestly exceeded its powers by investigating the substance of the award too comprehensively³ or that there has been a departure from a fundamental rule of procedure.⁴ The annulment procedure has been further derided for the lack of clarity with respect to the grounds of annulment as well as crucially, issuing inconsistent decisions.⁵ Annulment decisions have been further disparaged for including *obiter* statements that undermine the enforceability of decisions by pointing to mistakes in law but then failing to nullify them.⁶ It must be stressed that the ICSID annulment procedure

² E.g. Christoph Schreuer, "From ICSID Annulment to Appeal: Halfway Down the Slippery Slope" 10 *Law and Practice of International Courts and Tribunals* 211 (2009)

³ E.g. *BHD v Government of Malaysia*, ICSID Case No. ARB/05/10 (2009)

⁴ E.g. *Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12 (2009)

⁵ E.g. W Burke-White and A Von Staden, "Private Litigation in the Public Law Sphere: The Standard of Review in Investor-State Arbitrations" 35 *Yale Journal of International Law* 283 (2010) at 300

⁶ As in *CMS v Argentina*, ICSID Case No. ARB/01/8 (12 May 2005), where the annulment committee called attention to a number of errors of law made by the tribunal, but concluded that it did not have the authority to annul dispositive portions of the award.

is not intended to be an appeal on the legal merits of the award issued by the ad hoc arbitration tribunals. Decisions of annulment committees are just that – decisions and not awards. They are, or at least should be, assessments of the validity of the award rendered by the tribunal, not of the dispute itself.

Still, the above-noted weaknesses must be taken seriously because it is without question that ad hoc annulment committees do wield significant power. They can render an award issued by an ICSID tribunal legally ineffectual; an award that is annulled is erased as if it was never rendered. Furthermore, although ICSID does not operate under a system of precedent, it is widely acknowledged that there is an informal de facto system of precedent in operation, with arbitration tribunals as well as annulment committees generally attempting to as achieve some degree of consistency in their interpretation of legal principles, both substantively and procedurally. As a self-contained dispute settlement procedure ICSID annulment committees, like ICSID tribunals, should accordingly work towards enhancing the predictability of outcomes and in so doing solidify the expectations of investors and host states. This is a remarkably important role given that the composition of the annulment committees is effectively beyond the control of the member states of ICSID as well as the parties, indeed the lack of party control itself represents a derogation from the party-driven focus of arbitration. It is interesting to observe that investment arbitration websites now offer informal consolidation of annulment decisions by reference to the name of the individual annulment committee member.⁷ The implication is clear – investors are interested in identifying patterns in the decisions made by annulment members as this may imply predictive value in terms of future outcomes, even though the identity of the annulment

⁷ E.g. Investment Treaty Arbitration at <<http://www.italaw.com/annulment-committee-members>>

committee members are beyond their control. This intensifies the need to ensure that the manner in which annulment committees are chosen is transparent and consistent.

3. THE COMPOSITION OF ANNULMENT COMMITTEES

3.1 Selection of Annulment Committee Members

The composition of ICSID annulment committees is almost entirely beyond the control of the parties to the dispute as well as the member states of ICSID, falling exclusively within the authority of the Chairman of ICSID. Article 52 of the ICSID Convention outlines the procedure by which members of the annulment committee are selected. On receipt of the application for annulment from one of the parties, the Chairman shall appoint from the roster of Arbitrators an ad hoc committee of three persons. The only guidance with respect to this selection process other than the fact that annulment committee members must be on the Panel of Arbitrators (and not the Panel of Conciliators) is that none of the members of the committee may be members of the Tribunal which rendered the initial award, nor may they be nationals of either the relevant state party or of the state whose national is a party to that dispute, nor may he or she have been designated to the Panel of Arbitrators by either of those states, or have acted as a conciliator in the same dispute.⁸ As a consequence, the Chairman has several hundred candidates to choose from. Presumably given that being a full time ICSID arbitrator is not a full time position, the decision of whom to select may be dependent upon availability and possibly expertise, although this is unknown. Other than these considerations the Chairman's decision appears to be purely random.

⁸ Art 52(3)

3.2 The Chairman's Designations to the Panel of Arbitrators

A second layer of authority is vested in the ICSID Chairman with respect to the identity of annulment committee members at the arbitrator panel appointment stage. ICSID members may designate people to the roster Arbitrators and Conciliators from which the Chairman may choose annulment committee Members. Still, the Chairman himself (or herself) may also appoint individuals from which this selection may be made, without any consultation with individual member governments. Under Article 13(2) of the ICSID Convention, the Chairman may designate ten persons to each of the two Panels (Arbitrators and Conciliators). Each person must have a different nationality. Article 14 (1) specifies that persons appointed to be Panellists should be: “persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.” It further provides that “competence in the field of law shall be of particular importance in the case of persons appointed to the Panel of Arbitrators” as distinct from the Panel of Conciliators. Article 15(1) states that Panel members shall serve for renewable periods of six years, with the number of renewable periods unspecified. Subsection 2 of Article 14 adds that when the Chairman designates individuals to serve on the Panels (meaning the roster of Arbitrators and the roster of Conciliators), he or she should “pay due regard to the importance of assuring representation ... of the principal legal systems of the world and of the main forms of economic activity.” Exercising this authority above, in September 2011, the then President of the World Bank, Robert Zoellick, announced the most recent list of designations to ICSID’s Panel of Arbitrators and Panel of Conciliators. The ten appointees to the Panel of Arbitrators consisted of individuals from China, Colombia, France, Mexico, Morocco, New Zealand/Canada, Nigeria, Pakistan, Switzerland and the United

States.⁹ This list appears to be balanced in terms of linkages with the principal legal systems of the world. But again, there is no indication as to precisely how these designations were made by the Chairman and what criteria were used.

3.3 Challenge and Disqualification of Annulment Committee Members

Some party discretion is retained with respect to the composition of the annulment committee through the challenge and disqualification procedures available under ICSID rules. It is widely recognized that the ability of one party to challenge an arbitrator appointed by their opponents (or by a third party) is crucial to the credibility of international arbitration.¹⁰ The ICSID Convention states that a party may challenge an arbitrator “on account of any fact indicating a manifest lack of qualities required by” the Convention.¹¹ Tribunals have indicated that this determination is an objective one based on a reasonable evaluation of the evidence by a third party.¹² The reference to a “manifest lack of qualities” is seen as an unusually high standard in international arbitration – it is comparatively difficult to disqualify an arbitrator under the ICSID regime.¹³ On a literal reading of the text of the Convention, it appears that the disqualification procedure outlined in Article 57 of the Convention does not

⁹ Members of the Panels of Conciliators and Arbitrators, ICSID/10 (September 2011)

¹⁰ E.g. Charles Rosenberg, “Challenging Arbitrators in Investment Treaty Arbitration” 27:5 Journal of International Arbitration 505 at 505

¹¹ Art 57

¹² E.g. *Sociedad General de Aguas de Barcelona S.A. & Vivendi Universal S.A. v. Argentine Republic*; *AWG Group Ltd. v. Argentine Republic*, ICSID Case Nos. ARB/03/17 and ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, October 22, 2007, at [39].

¹³ Rosenberg, above note 10 at 517

apply to the selection of annulment committees. Indeed this article refers only to members of a “Commission” (of conciliators) or “Tribunal” (of arbitrators) and not to a committee. Drawing attention to this seeming gap in the text of the Convention, the annulment committee in *Vivendi v Argentina*¹⁴ decided that the same standards and procedure applies for determining challenges to annulment committee members as for ICSID tribunal members; namely that the remaining two members of the relevant committee rule on the challenge application. This decision was based upon Rule 53 of the Rules of Procedure, which states that provisions of the rules should apply equally to procedures involving annulment committees.¹⁵ The Committee inferred that the Arbitration Rules were to be applied to annulment committee proceedings, as long as this was not inconsistent with the object and purpose of the ICSID Convention.¹⁶ This determination was an important development in ICSID arbitration practice, placing a helpful additional layer of scrutiny over the composition of annulment committees. Still, the disqualification procedure empowers (to a limited degree) only the parties to the dispute, not the signatory states of the ICSID Convention, which as noted above, have only a marginal role in the establishment of annulment committees, through their appointment of arbitrators to the Panels.

Thus as specified above, subject to fairly limited rules, ICSID annulment committees are chosen by the Chairman without any real input from the parties to the dispute or the member countries of ICSID. While there is a very wide range of arbitrators in the Panel from

¹⁴ *Compania de Aguas del Aconquija SA and Vivendi Universal v Argentina* (ICSID Case No ARB/97/3)

¹⁵ At [3]

¹⁶ At [10]. The Committee noted the support of Christoph Schreuer’s influential commentary on ICSID procedure with respect to this conclusion, at [12] : Christop Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) at 1042

which to choose – at least several hundred – the committees are constituted at the sole behest of the Chairman who’s decision-making in that regard is subject to no oversight by the institution of ICSID itself, other than the potential for disqualification. The highly discretionary, random nature of the annulment appointment procedure must be considered in light of the more substantive accusations that have been levied against the way in which the annulment procedure has been approached by committees noted briefly above. Generally speaking it has been suggested that committees have shown a tendency to engage in “judicial activism” in reviewing awards on their merits.¹⁷ This charge is troubling given the fact that more than a third of all awards being fully or partially annulled with roughly 8 per cent fully annulled.¹⁸ Although some commentators are not persuaded by the suggestion that ICSID annulment committees feel that “they have a responsibility to the ICSID system as a whole and in the absence of a true appellate mechanism they should ensure doctrinal coherence and integrity,”¹⁹ others have observed a trend of “judicialization” within the annulment procedure in which committees have expanded the scope of their mandate to engage in substantive review of awards with a view to affecting the behaviour of parties prospectively.²⁰ Some have seen this movement as a positive development in as much as it is seen as a step towards greater legitimacy in the ICSID process, seen as highly public in nature in as much as it affects the rights of citizens at large, by contributing to the development of general standards

¹⁷ Schreuer above note 16 at 213

¹⁸ The ICSID Caseload Statistics (Issue 2013-1), The International Centre for the Settlement of Investment Disputes (Washington, DC) at 17

¹⁹ Caron, above note 1 At 188

²⁰ Kim, above note 1 at 245

of acceptable and unacceptable treatment by states towards international investors.²¹ Whether this may be accurate, clearly a greater degree of consistency is required in the annulment process. As such, the composition of annulment committees is so critical precisely because the role of the annulment committees as an institution within the ICSID system is in danger of straying beyond its designated mandate. Whether or not the enlargement of the annulment committees' powers is to continue, possibly by formally modifying the ICSID treaty, or whether this process should be restrained in favour of a more traditional approach in keeping with the tribunal's original stated mandate, the integrity of the annulment process could be improved by reframing the methodology of the committees' composition. Thus substantive improvements to the annulment procedure's mandate – keeping within the bounds of its discretion to assess the correctness of the procedure adopted by tribunals in rendering an award – could be achieved by ensuring greater ICSID member participation in the appointment of the annulment committees.

4. RECOMMENDATIONS FOR IMPROVING THE ANNULMENT COMMITTEE APPOINTMENT PROCEDURE

As illustrated above, the Chairman has several hundred candidates to choose from when making annulment committee appointments. Yet there is no official guidance on how such decisions are made, what criteria the Chairman uses to evaluate candidates and if external advice as sought or used in this process. Simply put there is no indication that annulment

²¹ Kim *ibid* at 252

committee selection is done in a purposeful manner whatsoever. While there may be a value choosing candidates purely at random, inasmuch as this connotes and a lack of bias at a superficial level, there is a critical lack of recognition of input from ICSID member states. The somewhat autocratic role of the Chairman in the annulment appointments process must be considered in light of the controversy that often surrounds the appointment of the President of the World Bank (the ex officio Chairman of ICSID). This position has tended to be held by an American, reflecting the US's decision-making dominance in the institution's system of weighted voting, much to the consternation of commentators from the developing world in particular.²² This seeming bias is more alarming given the developmental focus of the World Bank as well as the increasing economic importance, and financial contribution, of large emerging markets like China, India and Brazil. At one point there had been suggestions among ICSID members that the Chairman of ICSID should not be the same person as the President of the World Bank, but this proposal was rejected.²³

Given the importance of the annulment procedure, it makes sense in terms of fairness, consistency and the overall legitimacy of the ICSID system for the annulment procedure to focus on delivering its mandate as a reviewer of award process. Clearly clarifications with respect to the substance of annulment, which have been advocated by others and which are not the subject of this article, could improve the integrity of this process. More importantly, the ICSID annulment process can be improved by re-examining the way in which committee members are appointed, in particular by removing the almost unilateral discretion of the Chairman in this regard. Installing greater transparency and member participation into the

²² E.g. Xan Rice, Lionel Barber and William Wallis, "World Bank Selection a 'Hypocrisy Test'", The Financial Times (London) 28 March 2012

²³ Schreuer above note 16 at 20.

composition of the committees by reducing the Chairman's role will help ensure that committees fulfil their role as investigators of legitimacy of awards properly both in reality and in perception.

Mindful of this need for reform, useful lessons may be learned with regards to the appointment of ICSID annulment committee members by the procedures adopted by the World Trade Organization (WTO)'s dispute settlement system. Under the WTO's dispute settlement system, the WTO Secretariat proposes nominations to the dispute settlement panels. These nominations should not be opposed except for compelling reasons.²⁴ It is believed, however, that parties frequently reject proposed panellists with little justification.²⁵ As such, the panel process in WTO dispute settlement is somewhat similar to that of the selection of arbitrators under ICSID's arbitration procedures. The WTO's Appellate Body, which hears appeals from reports of the panels, is appointed exclusively at the behest of the institution itself without any influence of the parties. It is a standing, meaning permanent, international tribunal and is composed of seven persons of exceptional expertise who serve terms of four years which can be renewed once.²⁶ Decisions regarding the appointment of particular individuals to the WTO Appellate Body are made by a committee within the WTO's Dispute Settlement Body (which itself represents the all of the Member states of the WTO) and not by a single individual, such as the WTO Director General, who may be regarded loosely as the WTO's institutional equivalent to the World Bank President. The decision of WTO Appellate Body member appointment is taken on the recommendation of a

²⁴ Dispute Settlement Understanding Art 8.6.

²⁵ Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge University Press, 2008) at 246

²⁶ Dispute Settlement Understanding Art 17.2

Selection Committee, composed of various representatives from WTO committees, as well as the WTO Director General.²⁷ As with ICSID arbitrators, both WTO panels and Appellate Body Members must be independent and unbiased.²⁸ This process is evidently more transparent and participatory than that of the annulment committee appointment procedure at ICSID. This is because it involves the cooperation of many largely democratically appointed organs within the WTO institution, rather than the essentially opaque procedure at the individual discretion of one person that characterizes the ICSID annulment system. While it is true that the WTO Appellate Body wields more power than that of the ICSID annulment committees because the Appellate Body hears appeals on points of law and has the power to uphold, modify or reverse panel decisions, as suggested above the annulment committee's capacity to extinguish tribunal awards for procedural errors must not be taken lightly in terms of its overall role in the functionality of the ICSID dispute settlement system.

The obvious mechanism within ICSID to complement the role of the Chairman in annulment committee appointments is the Administrative Council. The Administrative Council is the governing body of ICSID and is comprised of one representative of each of the member states of ICSID, which each member having one vote. Among the various functions of the Administrative Council are the election of the Secretary General, the adoption of regulations for the conduct of ICSID proceedings and the adoption of the organization's annual budget. The democratic nature of the decision-making procedure of this body is ideally suited to the appointment of annulment committee members, or at least, some form of vetting of such members as proposed by the Chairman. It may be possible to establish a

²⁷ Dispute Settlement Understanding Art 2.4

²⁸ Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, [II(1)], WT/DSB/RC/1, 11 December 1996

committee within the Administrative Council for this purpose, possibly composed of member representatives serving temporary terms. The process could be further improved if a separate list of individuals suitable for annulment committees were maintained from which selections could be made. If a distinct body of people with familiarity with the annulment process were to be established, it would help ensure that these committees adhered to their narrow review function. It may be possible to assure their availability by offering them some institutional compensation from ICSID, akin to a part time position. Whatever the specific format of decision-making undertaken with respect to appointments, this kind of system would allow each member state of ICSID some measure of control over the annulment process and it would help ensure that the process remained focused on its intended mandate of procedural review.

In order to effect these changes to the ICSID Convention (enlarging the powers of the Administrative Council at the expense of the Chairman), the Convention itself would need to be amended. Of course it is not easy to amend a multilateral convention, however modifying the method by which annulment committee members are appointed should be significantly less problematic than establishing new grounds of annulment, or even more fundamentally, creating a substantive ICSID appellate tribunal, as many have considered.²⁹ Modifying the appointment procedure should be seen as a relatively minor adjustment in ICSID administrative procedure, especially in light of the significant advantages it could entail in terms of the dispute settlement system's overall effectiveness and validity. Moreover, while there may be some additional associated costs with a collective decision-making process, it

²⁹ E.g. Christian Tams, "An Appealing Option? The Debate About an ICSID Appellate Structure" Essays in Transnational Economic Law No. 57 / June 2006, <<http://www.telc.uni-halle.de/sites/default/files/altbestand/Heft57.pdf>>

would be exceeded by the benefits in terms of legitimacy and transparency enjoyed by the ICSID system in its entirety.

5. CONCLUSION

Broad debates about the role of international law in augmenting foreign direct investment while safeguarding the interests of civil society may bring greater scrutiny upon the processes that underlie investment dispute settlement through international arbitration tribunals like ICSID. The crucial role of the annulment committees in this regard should not be overlooked.³⁰ This article has suggested that the process by which ICSID annulment committees are appointed should be revisited, with greater oversight by the state parties to the ICSID Convention adding a layer of predictability and transparency. The procedures adopted by the WTO with respect to the appointment of Appellate Body members may be instructive in this regard. In particular it may be worthwhile to consider having the ICSID Administrative Council or a committee within ICSID to make annulment committee appointments, possibly drawn from a smaller pool of individuals with special expertise in annulment. This would be preferable than the current system in which this process falls exclusively into the hands of the ICSID Chairman with fairly narrow guidance and without any participation from the parties, other than the limited disqualification procedure. Clarifying and democratizing the annulment procedure in this manner would help ensure that this procedure adheres to its stated function – the assessment of the correctness of the process of awards rendered by tribunals, lending greater legitimacy and coherence to the annulment

³⁰ Caron, above note 1 at 191

procedure, limited as it is. If such, relatively modest modifications were possible and were ultimately viewed as successful by the international arbitration community and the membership of ICSID, procedural reform to the ICSID arbitration procedure could pave the way for a the re-assessment of more substantial changes to the dispute settlement institution in order to achieve greater coherence within the highly disparate field of international investment law, such as the instigation of a comprehensive appeals mechanism. For the time being, the fairly simple reforms to the annulment committee appointment procedures alluded to here should help ensure that this feature of ICSID arbitration stays focused on its mandate while improving the perception of inclusiveness and state control in the vital institution's dispute settlement regime.